

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MERCER MOUNTAIN PARTNERS	:	DETERMINATION
	:	DTA NO. 812295
for Revision of a Determination or for Refund	:	
of Tax on Gains Derived from Certain Real	:	
Property Transfers under Article 31-B of the	:	
Tax Law.	:	

Petitioner, Mercer Mountain Partners, c/o Robert Ross, P.O. Box 300, East Chatham, New York 12060, filed a petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law.

The Division of Taxation, represented by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel), filed a motion, dated August 9, 1994, to dismiss the above-captioned petition on the ground that petitioner's tax liability was "finally and irrevocably fixed" under Tax Law § 1444.2 by the signing of a consent to the amount due. The return date for the motion was September 15, 1994. Petitioner, represented by Many & Pehl (Jeffrey M. Many, C.P.A.), filed answering papers on September 2, 1994. Based on the exhibits submitted by petitioner, the affidavits in support of the motion by Kenneth J. Schultz, Michael Parada and John Skorenski and the exhibits attached thereto, Marilyn Mann Faulkner, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner has a right to a hearing under Tax Law § 2006.4 to challenge a tax liability asserted in a Statement of Proposed Audit Adjustment once petitioner signed the consent to the proposed audit adjustment.

FINDINGS OF FACT

The Division of Taxation ("Division") issued to petitioner a Statement of Proposed Audit Adjustment, dated July 5, 1991, asserting additional tax owed for real property transfer

gains tax in the amount of \$43,715.00.

On the bottom of the Statement of Proposed Audit Adjustment ("Statement"), the document informed petitioner that if it agreed that it owed the real property transfer gains tax contained on the Statement, then it should sign the bottom of the Statement and return the form with a certified check within 30 days. The Statement also contained the following printed words above the signature line:

"The Tax Law provides that a taxpayer is entitled to have tax due finally and irrevocably fixed by filing a signed consent with the State Tax Commission. Such consent, subject to review and approval, waives the ninety (90) day period for fixing tax due but does not waive the taxpayer's right to apply for a credit or refund within the time limit set forth by law. The agreement to and signing of this Statement constitutes such a consent."

On November 27, 1991, Robert A. Ross, president and partner of petitioner, signed the consent agreeing to the tax amount indicated in the Statement.

Petitioner thereafter filed a request for conciliation conference, dated May 11, 1993, for redetermination of a tax deficiency in the amount of \$33,307.00, plus penalty and/or interest in the amount of \$13,043.47. The request form referred to a notice dated February 20, 1992 with an identification number of L-004983422-4. Petitioner alleged that the tax was not owing because the allowable costs in computing the transfer gains tax had exceeded the original projections, the market value of the unsold lots within the development had decreased by 50% and, therefore, the sale of such lots would generate a loss for gains tax purposes. Attached to the request was a Consolidated Statement of Tax Liabilities, dated February 20, 1992, from the Division to petitioner, with the assessment identification number L-004983422-4 for the same amount as indicated on the request.

The conciliation conferee dismissed the request, by order dated July 23, 1993, stating that a request must be filed within 90 days from the date of the statutory notice and that because the notice was issued on December 30, 1991, the request was untimely filed.

Petitioner filed a petition, dated October 6, 1993, with the Division of Tax Appeals challenging the tax owed. Petitioner alleged that the tax assessment was correct at the time of the transfers, but that because the fair market value of the remaining lots declined and the lots

are currently being sold at a loss, these losses should be used to offset the transfer gains tax owed. Petitioner, therefore, urged that the assessment be reviewed at a hearing before the Division of Tax Appeals to avoid overpayment of the tax.

The Division filed a motion to dismiss the petition arguing that petitioner was not entitled to a hearing before the Division of Tax Appeals under Tax Law § 2006.5 because the tax was "finally and irrevocably fixed" under Tax Law § 1444.2 when petitioner signed the consent.

In support of its motion, the Division submitted an affidavit of Michael Parada, an employee of the Division's real property gains tax unit. In that affidavit, Mr. Parada stated that when petitioner signed the consent on the Statement, the form was returned to his unit and assigned, for tracking purposes, an assessment identification number of L004983422. He noted that because petitioner agreed to the tax owed, no Notice of Determination was issued, but that a Notice and Demand dated December 30, 1991 was issued to petitioner for the amount owed. He further noted that collection activities were initiated when no payment was received in response to the Notice and Demand. These collection activities included a warrant filed in April of 1992 and levies served in June of 1992.

Also attached to the motion to dismiss was an affidavit of John E. Skorenski, the conciliation conferee who issued the Conciliation Order. Mr. Skorenski explained that the "notice" referred to in the Conciliation Order was the Notice and Demand issued on December 30, 1991.

In its responding papers, petitioner argues that the Division's reliance on the language "finally and irrevocably fixed" in section 1444.2 is misplaced because the transfer gains tax law provides for periodic updates on the tax due with respect to the sale of lots in a real estate project. Petitioner contends that the Statement signed on November 27, 1991 did not take into account lot sales that took place after that date as well as certain allowable project costs. Petitioner opines that the transfer gains tax is not finally and irrevocably fixed until completion of the project and that it is entitled to a reaudit of the project to determine what the proper tax is

at this point in time.

CONCLUSIONS OF LAW

A. Tax Law § 2006.4 provides that a taxpayer is entitled to a hearing as a matter of right "unless a right to such a hearing is specifically provided for, modified or denied by another provision of this chapter." Under the real property transfer gains tax law, a person liable for gains tax may consent to have that tax "finally and irrevocably fixed" prior to the 90-day period provided to taxpayers to protest a tax liability asserted in a Notice of Determination (Tax Law § 1444[1], [2]). Thus, once a consent is signed, the taxpayer is bound pursuant to section 1444.2 to the amount consented to and may not challenge this amount at a hearing before the Division of Tax Appeals (see, Matter of BAP Appliance Corp., Tax Appeals Tribunal, May 28, 1992; Matter of Rosemellia, Tax Appeals Tribunal, March 12, 1992).

Here, there is no question that petitioner's president and partner, Robert Ross, voluntarily signed, on behalf of petitioner, the consent to the tax asserted in the Statement. Although BAP Appliance and Rosemellia concern the effect of signed consents under Tax Law § 1138(c) with respect to sales tax, the relevant language in Tax Law § 1444.2 is identical to that of section 1138(c). Moreover, contrary to petitioner's claim, the fact that subsequent sales of lots may result in a loss to the project as a whole does not change the effect of the signed consent with respect to the amount of tax owed at the time of the consent. When petitioner signed the consent, it agreed that the amount asserted in the Statement was the tax owed at that time. Any subsequent losses or costs incurred by petitioner may be taken into account in determining its subsequent gains tax liability on sales not covered by the consent, but do not affect the binding nature of the tax liability covered by the consent itself. Thus, because petitioner is seeking to reduce its tax liability under the consent and the consent finally and irrevocably fixed the tax liability under Tax Law § 1444.2, it is not entitled to a hearing under Tax Law § 2006.4 (see, Matter of BAP Appliance Corp., *supra*; Matter of Rosemellia, *supra*).

B. The Division of Taxation's motion to dismiss the petition is granted and the petition is dismissed.

DATED: Troy, New York
September 22, 1994

/s/ Marilyn Mann Faulkner
ADMINISTRATIVE LAW JUDGE